

[Second Circuit Holds Delayed Discovery Rule Applies to Unfair Competition Claims](#)

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Recently, in [Broberg v. The Guardian Life Insurance Company of America](#), 171 Cal. App. 4th 912 (2009), the Court of Appeal for the Second Appellate District held that the "delayed discovery" rule, which applies to delay accrual of the statute of limitations for fraud causes of action until such time as the plaintiff discovers facts putting him on notice of the fraud, applies to unfair competition claims *that are based upon alleged fraud*. In so holding, the court added to the conflict in published decisions on the issue of whether the "delayed discovery" rule applies to unfair competition claims. *See, e.g., Snapp & Associates Ins. Services, Inc. v. Robertson*, 96 Cal. App. 4th 884, 891 (2002) (holding the "delayed discovery" rule does *not* apply to unfair competition claims).

In *Broberg*, David A. Powell purchased a \$500,000 whole life insurance policy in 1993 from defendant The Guardian Life Insurance Company of America ("Guardian Life"). The Plaintiffs (Powell and the trustee of a related trust) alleged that Guardian Life's agent described the policy as so-called "vanishing premium" policy, *i.e.*, one where, after a certain number of out-of-pocket premium payments were made, the policy itself would generate sufficient sums through its dividend and interest income to pay future premiums for the balance of his life. Claiming Guardian Life's marketing materials and its agent made false and misleading statements in 1993, when Powell purchased the policy, the plaintiffs alleged causes of action for fraud, negligent misrepresentation, unfair competition and false advertising under California's Unfair Practices Act (Business and Professions Code section 17200 *et seq.*) and violation of the Consumers Legal Remedies Act ("CLRA"), Civil Code section 1750 *et seq.*). The plaintiffs further alleged that Powell did not discover the deception until Guardian Life sent a bill for additional out-of-pocket premiums in 2004. The trial court sustained demurrers to the complaint, concluding disclosures in the policy and marketing materials were at least sufficient to give Powell inquiry, if not actual, notice of the alleged deception. The trial court determined the fraud, negligent misrepresentation and unfair competition causes of action accrued in 1993, when Powell purchased the policy and, therefore, those claims were time-barred under the three-year statute of limitations for fraud (*see* Code Civ. Proc. § 338 (d)) and the four-year statute of limitations for unfair competition (*see* Bus. & Prof. Code § 17208). The trial court also concluded, based upon disclaimers in the documents, that the plaintiffs could not establish reliance as a matter of law. The trial court further determined that the CLRA claim was not viable, as the CLRA does not apply to insurance. (*See Fairbanks v. Superior Court*, 46 Cal. 4th 56 (2009) (holding the CLRA does not apply to insurance). Finally, although the trial court ruled that the allegations did not justify an unfair competition cause of action based on the "vanishing premium" theory, they were sufficient to state a claim amounting to an unfair and unlawful sales tactic.

The plaintiffs then filed an amended complaint, adding allegations that, at the time Guardian Life sold the policy in 1993, it knew additional out-of-pocket premiums would be required if dividend rates dropped and that, as of 1993, Guardian Life already was engaged in a plan to gradually "ratchet down" its dividend scale. The trial court again sustained Guardian Life's demurrer to the

first amended complaint in its entirety, explaining that the disclaimers in the marketing illustration and policy were sufficient (1) to trigger at least inquiry notice in 1993, thus starting the statutes of limitation as to the fraud, negligent misrepresentation and unfair competition claims, and (2) to preclude justifiable reliance on any alleged promise that no further out-of-pocket premiums would be required after the 11th policy year.

The Court of Appeal reversed the trial court's order, noting the conflict among appellate courts as to whether a "delayed discovery" rule applies to unfair competition claims, and concluding that the delay rule does apply *in the context of unfair competition claims based on the defendant's allegedly deceptive marketing materials and sales practices*. *Guardian Life, supra* at 920-921. The court reasoned that the delayed discovery rule should apply in unfair competition cases based on a fraud theory, because the unfair competition claim simply presents a different theory for challenging fraudulent conduct. *Id.* Accordingly, the court held that the cause of action for fraud-based unfair competition claims accrues when a reasonable person would have discovered the factual basis of the claim. Under the facts alleged, the court did not agree that the issue could be determined as a matter of law at the demurrer stage, especially because the reasonableness of a plaintiff's conduct must be viewed in light of each plaintiff's knowledge, experience and intelligence. *Id.* Finally, the court rejected Guardian Life's argument that Powell could not reasonably rely on the alleged misleading statements in light of policy language to the contrary. The court explained that Powell did not allege he was told premiums would stop, but only that, after the 11th policy year, no further out-of-pocket payments would be required. Accordingly, the court concluded that, although Powell could be charged with knowledge of policy language, nothing in the policy itself was inconsistent with the alleged misrepresentations on which the lawsuit was based. *Id.* at 923.

Given the conflict among the courts of appeal concerning whether the "delayed discovery" rule applies to unfair competition claims, we could see this issue before the California Supreme Court in the relatively near future.